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No. 93-589

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In the Supreme Court of the United States

OCTOBER TERM, 1993

PRO-TECH SECURITY NETWORK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner's "watch commanders" are not "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, and that petitioner violated Section 8(a) (3) and (1) of the Act by disciplining two of them because of their union activity.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a) (1) of the Act by interrogating its employees concerning their union activity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a5) is unreported, but the judgment is noted at 993 F.2d 1538. The decision and order of the National Labor Relations Board (Pet. App. c1-c7) and the decision of the administrative law judge (Pet. App. d1-d68) are reported at 308 N.L.R.B. 655.

JURISDICTION

The decision of the court of appeals was entered on June 8, 1993. A petition for rehearing was denied on July 7, 1993. Pet. App. b1. The petition for a writ of certiorari was filed on September 15, 1993. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 16, 1990, petitioner, a sole proprietorship owned and managed by Isaiah Rhodes, began providing security services at the Coast Guard Base Support Center in Elizabeth City, North Carolina, pursuant to a contract with the United States Coast Guard (Coast Guard). Pet. App. d6-d7. Petitioner's personnel operate the checkpoint at the main gate to the facility and patrol various buildings and grounds. These services are provided daily in three eight-hour shifts, each of which is staffed by a "watch commander" and two patrol persons. *Id.* at d7-d8.

During October and November 1990, petitioner's employees discussed among themselves the possibility of being represented by a union. As a result of these discussions, employee Hassie Reynolds, a watch commander, contacted the United Plant Guard Workers of America (the Union). Reynolds agreed to arrange for the employees to meet with representatives of the Union so that the Union could determine whether it enjoyed sufficient support to file a representation petition with the National Labor Relations Board (Board). Pet. App. d8-d10.

That meeting took place on November 24 in the guardhouse at the main gate of the Coast Guard facility. Pet. App. d10. Nine of petitioner's fourteen employees attended, including Reynolds, who was on duty as watch commander during the meeting, and Edwin Desiderio, an off-duty watch commander. *Id.* at d12, d13. As Desiderio described it, "[T]he whole Union meeting was * * * so we could see what we could do to get our uniform pay and holiday pay * * *. [E]verybody was dissatisfied with what was

going on up there." During the discussion, Desiderio, referring to Rhodes, commented "let's screw the bastard." *Id.* at d13-d14.

Rhodes quickly learned about the union meeting through telephone calls from some of the employees who had attended it. Pet. App. d14. When Reynolds reported for work on November 28, Howard Simons, petitioner's "site supervisor" at the Coast Guard facility, advised him to be "careful of what you say, Mr. Rhodes knows all about your meeting, who was there, [and] what took place." *Id.* at d15. Simons also informed Reynolds that Rhodes had told him, "[L]et them go ahead and have their fucking Union, [I (Rhodes)] could bargain with it." *Id.* at d15-d16.

On December 10, the Union filed a representation petition with the Board. Pet. App. d16. Two days later, on December 12, Rhodes sent Simons a letter announcing the demotion of Reynolds and Desiderio from the rank of watch commander to patrolman. In that letter, Rhodes explained that he was demoting Reynolds "[s]o that he can perform his duties for the union." *Id.* at d18. Rhodes gave no reason for demoting Desiderio. The Union challenged the demotions on December 24 by filing an unfair labor practice charge with the Board. *Id.* at d1-d2. On December 31, Simons placed Reynolds on indefinite suspension for "failure to perform supervisory duties" during the union meeting, *id.* at d22, and he issued Desiderio a written warning which gave, as justification for Desiderio's demotion, his use of "abusive language" in referring to Rhodes as a "bastard" during the union meeting. *Id.* at d22-d23.

In late December, Rhodes personally distributed a "survey" to the employees concerning the November 24 union meeting, which he asked them to read and

sign. Pet. App. d23, d25. Rhodes prepared and distributed the survey in order to verify how many employees had "signed up with the union." *Id.* at d33.[1]

On February 5, 1991, the Board conducted a secret-ballot election. The election resulted in a seven-to-

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[1] The survey read as follows (Pet. App. d23-d25):

> TO: PRO-TECH SECURITY NETWORK
> ATTN: I.R. RHODES/GEN MGR
>
> In regards to the meeting held on November 24, 1990, between the hours of 1:30 p.m.-3:10 p.m.
>
> *PLEASE NOTE THAT THE CARD THAT YOU SIGNED WAS TO JOIN A UNION!!!*
>
> I was not misinformed about the Union, when I signed the card to [the] best of my knowledge.
>
> Yes —— No ——
>
> I was misinformed when I signed the card and did not at that time intend to join the Union.
>
> Yes —— No ——
>
> I understood that by signing the card that it was just to listen to a representative from the Union.
>
> Yes —— No ——
>
> I would rather not comment.
>
> Yes —— No ——
>
> I did not sign the card.
>
> Yes —— No ——
>
> Signed: ————————
>
> Dated: ————————

Rhodes claimed that he distributed the survey because he understood the Union's representation petition to state that 13 employees had already joined the Union, and he believed it "almost impossible" for that number actually to have done so. Pet. App. d25. The representation petition stated, however, that 13 employees were in the proposed bargaining unit, not that 13 had joined the Union. *Id.* at d17 n.12.

seven tie, with no challenged or void ballots. Pet. App. d28. On February 20, Rhodes telephoned Desiderio to ask him whether he wanted to return to his position as a watch commander. When Desiderio asked Rhodes why he was making him the offer, Rhodes replied, "Because I think you're capable of doing the job." *Id.* at d29. Desiderio resumed work as a watch commander the following day, but did not receive lost wages for the period of his demotion. *Id.* at d29, d30 n.16. Reynolds was never called to work from his indefinite suspension.

2. On February 7, 1991, the Board's General Counsel issued a complaint against petitioner based on the Union's unfair labor practice charge. The complaint alleged that petitioner's discipline of Reynolds and Desiderio violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C 158(a)(3) and (1), and that the distribution of the survey independently violated Section 8(a)(1). Pet. App. d2-d3.

After a hearing, an administrative law judge (ALJ) concluded that employees, including Reynolds and Desiderio, who attended the November 24, 1990 meeting with the Union's representatives were engaged in activity protected by the Act. Pet. App. d43-d47. Then, applying the Board's test in *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the ALJ concluded that petitioner's discharge of Reynolds and demotion of Desiderio violated Section 8(a)(3) and (1) of the Act. The ALJ found that petitioner took those adverse actions against Reynolds and Desiderio because of their participation in the union meeting, and, moreover, that petitioner failed to demonstrate that it would have done so had

they not engaged in protected activity. Pet. App. d42-d43, d47-d56.

In reaching that conclusion, the ALJ rejected petitioner's contention that Reynolds and Desiderio, as watch commanders, were "supervisors" within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), and thus not covered by the protections of the Act.[2] Pet. App. d42. The ALJ found that petitioner's watch commanders do not possess or exercise any authority respecting the hiring, transferring, suspending, laying off, recalling, promoting, discharging, rewarding, or adjusting grievances of patrol persons. *Id.* at d40. Moreover, the ALJ observed, a watch commander's duties do not require the exercise of independent judgment: to the limited extent that a watch commander's tasks are not routine or repetitious, he or she contacts Coast Guard officials for relevant instructions. *Id.* at d39. The ALJ also noted that watch commanders do not assign work to patrol persons, cannot grant patrol persons time off or permission to leave work early, and do not direct the work of patrol persons, since each patrol person has a written description of his or her duties and carries them out

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[2] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and thus from the unfair labor practice provisions of Section 8, "any individual employed as a supervisor." Section 2(11) defines "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

without guidance or input from the watch commander. *Ibid.*

Applying the Board's test in *Rossmore House*, 269 N.L.R.B. 1176 (1984), enforced *sub nom. Hotel Employees Local 11* v. *NLRB*, 760 F.2d 1006 (9th Cir. 1985), the ALJ also concluded that the survey distributed to the employees by Rhodes constituted unlawful interrogation under Section 8(a)(1) because, in the totality of the circumstances, it reasonably tended to restrain or interfere with the employees' exercise of rights protected by the Act. Pet. App. d30-d34.

The Board affirmed the ALJ's decision and adopted his remedial order which, *inter alia*, required petitioner to reinstate Reynolds as a watch commander and to make both Reynolds and Desiderio whole for lost pay and other benefits. Pet. App. c1-c7, d62-d63.[3]

3. The court of appeals enforced the Board's order in an unpublished per curiam opinion. Pet. App. a1-a5. The court affirmed, as supported by substantial evidence, the Board's findings that petitioner's demotion of Desiderio, discharge of Reynolds, and distribution of the survey violated Section 8(a)(3) and (1) of the Act. *Id.* at a5.

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[3] The Board, in agreement with the ALJ, also concluded that a new election was warranted because of petitioner's unfair labor practices. Pet. App. c4-c7, d56-d58. That aspect of the Board's order was not before the court of appeals, see *Firestone Synthetic Fibers Co.* v. *NLRB*, 374 F.2d 211, 213 n.3 (4th Cir. 1967), and no issue respecting it is raised here.

ARGUMENT

1. Petitioner contends (Pet. 16-20) that the Board's finding that its watch commanders are not supervisors within the meaning of Section 2(11) of the Act conflicts with its contract with the Coast Guard, which requires petitioner to classify the watch commanders as "supervisory," and that the Coast Guard's determination is binding as a matter of law on the Board.

That claim is not properly presented in this Court. Petitioner raised that contention for the first time in a petition for rehearing in the court of appeals. Before the ALJ, the Board, and the court of appeals, petitioner had previously urged that, in all of the circumstances, including the terms of the Coast Guard contract, its watch commanders were not supervisors under Section 2(11) of the Act. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Since petitioner has shown no such circumstances here, it is jurisdictionally barred from raising its contention before this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

In any event, petitioner's contention is without merit. Nothing in the Board's decision precludes petitioner from treating its watch commanders as "supervisors" for purposes of the Coast Guard contract. But not every individual who exercises some supervisory authority over subordinates is a supervisor under Section 2(11) of the Act.[4] Whether an

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[4] For example, Section 2(11) preserves a distinction "between straw bosses, leadmen, set-up men, and other minor

individual is a Section 2(11) supervisor is determined not by his or her job title or job classification, but by whether the individual is vested by the employer with the duties and authority specified in Section 2(11). Pet. App. d37; *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959); *Food Store Employees Local 347* v. *NLRB*, 422 F.2d 685, 689-690 (D.C. Cir. 1969); *Omnix Int'l Corp.*, 286 N.L.R.B. 425, 426 (1987); *Open Taxi Lot Operation-San Francisco Int'l Airport*, 240 N.L.R.B. 808, 809 (1979). That determination is exclusively for the Board to make, subject to deferential judicial review. See *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962). The ALJ examined the job duties of petitioner's watch commanders and concluded that they are not vested with any of the indicia of supervisory authority specified by Section 2(11). That fact-bound determination does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner's submission, the Board's decision in this case ignores neither petitioner's legitimate interests, nor those of the Coast Guard. A finding that the watch commanders are "employers," rather than "supervisors," under the Act does not preclude petitioner from disciplining or discharging them for failing to perform their assigned job duties

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supervisory employees * * * and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974).

in a manner consistent with the requirements of the Coast Guard contract. See Section 10(c), 29 U.S.C. 160(c) ("[n]o order of the Board shall require the reinstatement of any individual as an employee * * * if such individual was suspended or discharged for cause"). The Board found, however, that petitioner discharged Reynolds and demoted Desiderio, not for any such legitimate reason, but rather in retaliation for their having participated in protected activity. Pet. App. c2-c3 n.2, d52, d55, d56. That finding raises only another evidentiary issue that does not warrant this Court's review.

2. Petitioner also contends (Pet. 22-24) that the Board's finding that the survey distributed by Rhodes to the employees was unlawful interrogation under Section 8(a)(1) of the Act is not supported by substantial evidence. That contention is without merit. Under the Board's test, in *Rossmore House*, *supra*, an employer's interrogation of employees respecting their union activities violates Section 8(a)(1) if, "under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." 269 N.L.R.B. at 1177. Among the factors relevant to that determination are whether the interrogation takes place against a background of employer hostility or discrimination toward protected activity; the nature of the information sought; the identity of the questioner; and the place and method of interrogation. *Id.* at 1178 n.20, citing *Bourne* v. *NLRB*, 332 F.2d 47 (2d Cir. 1964). The ALJ evaluated petitioner's survey under *Rossmore House*. He found that the questioner, Rhodes, was petitioner's highest ranking official, that the survey specifically asked whether the responding em-

ployee had signed a union card, and that the survey implied that Rhodes knew or learned about union meetings as they occurred. Pet. App. d32-d33. The ALJ further noted that Rhodes did not provide recipients of the survey assurances against reprisal, and that he wanted employees to return completed surveys signed. *Id.* at d33. In light of those circumstances, the ALJ reasonably concluded that the survey had a reasonable tendency to interfere with the employees' exercise of their right to organize a union. *Id.* at d34.

Petitioner asserts (Pet. 22-23) that the survey cannot be deemed an unfair labor practice unless Rhodes was motivated by an "improper subjective intent," and that Rhodes' explanation of why he decided to distribute the survey shows that his motive was a legitimate one. This contention is incorrect for two reasons. First, under the Board's *Rossmore House* test (which petitioner does not challenge), the inquiry into whether interrogation violates Section 8(a)(1) is an objective one that requires analysis of all of the circumstances in which the questioning of employees occurs. The relevant issue is whether the interrogation reasonably tends to restrain, coerce, or interfere with employees' exercise of rights guaranteed by the Act, not whether the questioner was actually motivated by a desire to do so. *Rossmore House*, 269 N.L.R.B. at 1177; *W.A. Sheaffer Pen Co.* v. *NLRB*, 486 F.2d 180, 181-182 (8th Cir. 1973).

Second, where, as here, the union has filed a representation petition with the Board, a poll of employees respecting their union allegiances serves no legitimate employer interest, since the Board election itself will establish the union's numerical strength in

the bargaining unit. *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967); *NLRB* v. *Harry F. Berggren & Sons*, 406 F.2d 239, 243 n.5 (8th Cir. 1969). Thus, as the ALJ observed (Pet. App. d33), even accepting Rhodes' proffered reason for distributing the survey—his desire to verify whether, as he understood the Union's representation petition to state, 13 employees had "signed up with the union"—that explanation does not constitute a lawful basis for his action.[5]

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[5] Petitioner errs in relying (Pet. 23) on *NLRB* v. *Brown*, 380 U.S. 278 (1965). *Brown* involved a categorically different variety of employer conduct from that presented in this case: there, a multi-employer bargaining group locked out its employees and continued operations with temporary replacement workers in response to a whipsaw strike against one of its members. *Id.* at 279-280. The Court explained that, in those circumstances, "the resulting harm to employee rights is * * * comparatively slight, and a substantial and legitimate business end is served" by the employers' actions. *Id.* at 289. On those particular facts, the Court held that "the finding of an unfair labor practice under [Section] 8(a)(3) requires a showing of improper subjective intent" on the part of the employers, and that, "in the absence of evidentiary findings of hostile motive," their conduct could not be deemed to violate Section 8(a)(1). *Id.* at 286, 289. The Court confirmed in *Brown*, however, that where, as here, "the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends," then "the Board need not inquire into employer motivation to support a finding of an unfair labor practice." *Id.* at 282.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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